

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALD T. BROWN and U.S. POSTAL SERVICE,
POST OFFICE, Tulsa, Okla.

*Docket No. 96-2158; Submitted on the Record;
Issued December 7, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that an overpayment in the amount of \$3,322.85 was created; (2) whether the Office properly denied waiver of the overpayment in compensation; (3) whether the Office properly determined that \$300.00 per month would be withheld from his continuing compensation benefits; and (4) whether appellant has greater than a 12 percent impairment of his left leg for which he received a schedule award.

On October 20, 1994 appellant, then a 47-year-old letter carrier on sedentary duty from a prior employment injury,¹ sustained an employment-related anterior cruciate ligament tear of the left knee when he tripped over a chair at work. He stopped work that day and underwent authorized knee surgery on December 1, 1994. Following expiration of continuation of pay, on December 5, 1994 appellant began receiving wage-loss compensation. The record contains computerized information indicating that compensation checks were issued on January 6, March 24 and 31 and April 7, 1995, totaling \$7,060.12.²

On March 22, 1995 appellant returned to his part-time sedentary job. An Office memorandum dated March 14, 1996 indicates that, based on an audit by the Office of the

¹ Appellant had sustained an employment-related back injury while assigned to letter carrier duties and, at the time of the instant claim, was working 4 hours per day performing sedentary work and receiving wage-loss compensation for 20 hours per week based on a prior wage-earning capacity determination. The prior claim was adjudicated under Office number A16-158061 and the instant claim was adjudicated under Office number A16-249961. He had also sustained a nonemployment-related left knee injury from a motorcycle accident with residual instability of the left knee.

² The check issued on January 6, 1995 was in the amount of \$1,388.77 for the period December 5 to 23, 1994; the March 24, 1995 check was in the amount of \$451.64 for the period December 24 to 31, 1994; the check issued on March 31, 1995 was in the amount of \$4,135.60 for the period January 1 to March 3, 1995; the check issued on April 7, 1995 was in the amount of \$1,084.11 for the period March 4 to 21, 1995.

Inspector General, a potential overpayment had been created in this case because appellant had been receiving compensation for four hours per day based on a prior wage-earning capacity determination and was also paid compensation for the instant claim using a full-time pay rate. The Office calculated that for the period December 5, 1994 to March 21, 1995, appellant had received an overpayment in compensation in the amount of \$3,322.85 because he was entitled to compensation in the amount of \$3,285.63 but had received compensation in the amount of \$6,608.48. On March 29, 1995 the Office issued a preliminary determination that an overpayment of compensation occurred in appellant's case and found that he was not at fault in the creation of the overpayment. The Office provided appellant with an overpayment recovery questionnaire to allow the Office to determine whether the circumstances warranted waiver of recovery of the overpayment.

Memoranda of telephone conversations between appellant and the Office indicate that appellant disputed the existence of the overpayment, claiming that he had received only one check. In response to his request that tracers be placed on the checks in question, on June 24, 1996 the Office advised him to provide a written request for a tracer. The Office reviewed its payment history and found a lack of evidence to show that the four separate checks issued for the period December 5, 1994 to March 21, 1995 were canceled or returned, and by decision dated June 25, 1996 the Office finalized the overpayment determination, finding that the circumstances did not warrant waiver of the recovery of the overpayment. The Office determined that \$300.00 per month would be deducted from appellant's continuing compensation benefits to repay the overpayment.

The relevant medical evidence regarding appellant's schedule award claim includes a December 15, 1994 report in which Dr. Ronald G. Hood, his treating orthopedic surgeon, provided measurements on range of motion of the left lower extremity. He reported 90 degrees range of motion on flexion which, under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,³ correlates to 10 percent impairment of the left leg. Dr. Hood also advised that appellant had an additional two percent impairment based on a December 1, 1994 partial medial meniscectomy.⁴ Following an Office request, by report dated May 5, 1996, an Office medical adviser concurred with Dr. Hood's findings that, under the A.M.A., *Guides*, appellant sustained a 12 percent impairment of his left leg. By decision dated May 16, 1996, the Office granted appellant a schedule award for 12 percent impairment of his left leg.

The Board finds that appellant has no greater than a 12 percent impairment of his left leg.

The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulation⁶ set forth the number of weeks of compensation payable to employees

³ A.M.A., *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (hereinafter A.M.A., *Guides*).

⁴ While Dr. Hood reported findings with respect to the degree of arthritis of the knee, he attributed the degenerative changes to appellant's preexisting knee condition as opposed to the October 20, 1994 employment injury.

⁵ 5 U.S.C. § 8107.

sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The Office has adopted the A.M.A., *Guides*, and the Board has concurred in such adoption as an appropriate standard for evaluating schedule losses.⁷

In the present case, Dr. Hood, an orthopedic surgeon, provided range of motion findings in his December 15, 1995 report, which correlated to a 10 percent loss of use of the leg.⁸ A partial medial meniscectomy, which was performed by Dr. Hood on December 1, 1994, provides an additional two percent impairment under the A.M.A., *Guides*.⁹ Based on Dr. Hood's report, the Office medical adviser correlated the findings to the A.M.A., *Guides*, to arrive at 12 percent impairment of the left lower extremity.¹⁰ As appellant submitted no additional evidence, he has not established that he has greater than a 12 percent impairment of his left lower extremity from his employment-related injury for which he received a schedule award.

The Board further finds that this case is not in posture for decision regarding whether an overpayment in compensation has been created.

Section 8129(a) of the Act¹¹ provides that, where an overpayment of compensation has been made "because of an error of fact or law" adjustments shall be made by decreasing later payments to which an individual is entitled. The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustments or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."¹²

In the instant case, computerized Office records indicate that appellant was paid at the full-time pay rate for the period December 24, 1994 to March 21, 1995 when he was in receipt of continuing compensation for 20 hours per week from a prior wage-earning capacity determination and that a total of four checks were issued to appellant for wage-loss compensation for that period. Appellant, however, contended that he received one check only

⁶ 20 C.F.R. § 10.304.

⁷ See *Danniel C. Goings*, 37 ECAB 781 (1986).

⁸ Under the applicable table, 90 degrees of flexion correlates to a 10 percent impairment of the leg. A.M.A., *Guides* 78, Table 41.

⁹ *Id.* 85, Table 64.

¹⁰ See *supra* notes 8 and 9.

¹¹ 5 U.S.C. § 8129(a).

¹² 5 U.S.C. § 8129(b).

for the period in question, and on June 24, 1996 requested that the Office place tracers on the compensation checks. He was told to make his request in writing. Nonetheless, on the following day, June 25, 1996, the Office finalized the overpayment determination. As the record contains no evidence to indicate that the Office traced the checks in question, the Board is unable to determine whether an overpayment in compensation was created. The case shall therefore be remanded for the Office to institute a tracer action for the compensation payments issued to appellant.¹³ After this action is complete, the Office shall issue a *de novo* decision finding whether an overpayment has occurred and, if so, whether appellant is entitled to waiver.¹⁴

The decision of the Office of Workers' Compensation Programs dated May 16, 1996 is hereby affirmed. The decision dated June 25, 1996 is vacated and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, D.C.
December 7, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹³ The Board notes that computerized Office records indicate that appellant received wage-loss compensation in the amount of \$7,060.12 during the period in question whereas an Office overpayment worksheet indicates that appellant received compensation in the amount of \$6,608.48.

¹⁴ In light of the Board's disposition of this case, the issues regarding waiver and repayment need not be reached.